The undoubted weight of American authority is in accord with the English doctrine prior to the statutes aforementioned.[7] Our courts adopted the rule as one firmly established in equity jurisprudence. And several courts have laid stress on the fact that a contrary holding would abridge freedom of speech and the liberty of the press. There are cases, however, where courts have issued injunctions to restrain the publication of false statements injurious to business or property; but those were cases which involved conspiracy, intimidation or coercion.[8] For example, an injunction was issued to restrain one from issuing circulars threatening to bring suits for infringements against all customers dealing in a competitor's patented article, thus attempting to intimidate complainant's customers by threatening them with suits which the defendants never intended to prosecute.

In view of the extent to which libellous publications are being used today by unscrupulous men to further their private interests by defaming the good name and reputation of their competitors, and in view of the pernicious and detrimental effect of this upon business, the greater protection afforded by the English courts under the present statutes seems to be demanded by a just regard for the vastness and variety of our commercial interests. In practice, the liability to criminal prosecution or to a civil action for damages has not proved effectual. Our jurisprudence must in some way meet that demand. An immediate change by the courts themselves would be a palpable violation of judicial functions. It is, then, for the legislators to realize that our commercial interests require a prevention of the wrong, rather than punishment or satisfaction for it after it is committed.

Y. L. S.

WITNESSES—SELF-INCRIMINATION—IMMUNITY—The Court of Criminal Appeals of Texas recently held[1] that under the codes as construed by the decisions, where the district attorney tenders immu-

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[7] Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69 (1873); Sherry v. Perkins, 147 Mass. 212 (1888); Marlin Co. v. Shields, 17 N. Y. 384 (1902); Balto. Life Ins. Co. v. Geisner, 202 Pa. 386 (1902); Mayer v. Journeyman Assn., 47 N. J. Eq. 519 (1890); Singer Mfg. Co. v. Domestic Co., 49 Ga. 70 (1873); Kidd v. Hoery, 28 Fed. Rep. 774 (1886); Co. v. Union, 51 Fed. Rep. 260 (1891); Edison v. Co., 128 Fed. Rep. 957 (1904); Mtg. Assn. v. Co., 150 Fed. Rep. 413 (1907); Citizens Co. v. Mtg. Co., 171 Fed. Rep. 553 (1909); College v. Co., 197 Fed. Rep. 982 (1912); Francis v. Flynn, 118 U. S. 385 (1885).

[8] Beck v. Ry. Union, 118 Mich. 497 (1898); Einack v. Kane, 34 Fed. Rep. 46 (1888); Casey v. Union, 45 Fed. Rep. 135 (1891); Adriance Co. v. Nat'l Co., 121 Fed. Rep. 827 (1903).

[1] *Ex parte* Muncy, 163 S. W. Rep. 29 (Tex. 1914).

nity from punishment and such offer receives the sanction and approval of the district judge, this furnishes absolute and complete immunity from punishment for offenses about which he might be questioned and called to testify, and the witness cannot claim the privilege from self-incrimination and could be imprisoned for his refusal to testify.

One of the most cherished sanctions of our common law is that a witness will not be compelled to answer any question the reply to which would supply evidence by which he could be convicted of a criminal offense.[2] Such privilege, moreover, has been almost universally secured by constitutional provision. Stringent as the general rule is, certain classes of cases have always been treated as not falling within the reasons of the rule, and, therefore, constituting apparent exceptions. When examined these cases will all be found to be based upon the idea that, if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness, the rule ceases to apply, its object being to protect the witness himself and no one else. Legal criminality consists in liability to the law's punishment. When that liability is removed, criminality ceases, and with that criminality the privilege. An acquittal conclusively negatives criminality and in such case the rule does not apply.[3] The same is true of a crime erased by lapse of time. Such is in effect an expurgation of the crime, and after the lapse of the time fixed by the law the privilege ceases.[4]

Statutes of indemnity and special amnesty have the same effect, when they do not conflict with local constitutions.[5] The law, however, must afford absolute immunity against future prosecution for the offense to which the question relates.[6] If the object of the provision be to secure the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosure, then, if no such prosecution be possible,—in other words, if his testimony operates as a complete pardon for the offense to which it relates,—a statute absolutely securing him such immunity would satisfy the constitutional guaranty against being compelled, in any criminal case,

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[2] Whart. Cr. Ev. (8th Ed.), §463; Greenleaf Ev. (15th Ed.), Vol. 1, §451.

[3] Floyd v. State, 7 Tex. 215 (1851).

[4] Malanke v. Cleland, 76 Ia. 401 (1888); Lamson v. Boyden, 160 Ill. 613 (1896).

[5] Whart. Cr. Ev. (8th Ed.), §471.

[6] Counselman v. Hitchcock, 142 U. S. 547 (1892); Cullen v. Comm., 24 Grat. 624 (Va. 1873),—"that nothing short of complete amnesty to the witness, and absolute wiping out of the offense as to him, so that he could no longer be prosecuted for it, would furnish indemnity."—Quoted with approval in *Ex parte* Carter, 166 Mo. 604 (1902).

to be a witness against himself.[7] It may be said that statutory immunity virtually repeals the law creating the crime under the particular state of facts, or to put it in technical form, the law defining the offense is restricted in its application so as to prevent there being an offense under a given state of facts in which the immunity is declared to exist. Criminality is the creation of the law, not an inherent element in the act itself. It may therefore be taken away by the law. Many such statutes annulling the privilege against self-incrimination have been passed.[8] They have been the expedients resorted to for the investigation of offenses whose proof and punishment were otherwise practically impossible because of the criminal implication to the offense itself of all who could bear useful testimony. Any evidence that a witness may give under a statutory direction will not be "against himself" for the reason that by the very act of giving evidence he becomes exempted from any prosecution or punishment for the offense respecting which his evidence is given.[9]

The majority of the court in the present case maintain that the constitutional inhibition has no application any more than in the above cases for the witness is protected against the evidence he may give being used against him, and this is what the constitution guarantees him—nothing more and nothing less. But is this true, is he protected? Davidson, J., in a vigorous dissent, says that after a most painstaking investigation he had found that the power to thrust immunity upon a witness against his consent, and compel his testimony where such testimony implicates him in a crime, had never been lodged or vested in the judicial department of the government. As brought out by counsel in their argument and the dissenting opinion the cases cited by the majority as supporting the view that the courts have this right will be found to be cases where the witness agreed to testify. Indeed it may be said that no case holding assent not necessary can be found. The majority say that it would be absurd to require the district judge and attorney when they desire to use a witness to beg him to enter into agreement with the State, that it would be lowering the dignity of the courts to require such a thing. Such can hardly be said to be the case where a constitutional privilege is at stake. Such immunity as tendered here does not seem to be complete because the whole matter was conditional upon his testifying and carrying out the agreement. This is what differentiates it from the statutory immunity, which is complete whenever he is used as a witness and compelled to testify. Moreover the immunity granted to obtain the testimony is in the nature of a pardon or amnesty, and no pardon or amnesty

[7] Brown v. Walker, 161 U. S. 591 (1896), Brown, J.

[8] Wigmore, Ev. (1905), Vol. IV, p. 3167.

[9] *Ex parte* Cohen, 104 Cal. 524 (1894).

can be effective until voluntarily accepted by the person pardoned.[10] This is another reason in support of the proposition that the court cannot, at request of state's attorney or otherwise, compel the accused to testify against his will.

It has been said that the constitutional guaranty protects a witness from all compulsory testimony which would expose him to infamy and disgrace, though the facts disclosed might not lead to a criminal prosecution.[11] This doctrine rests on a misconception so radical,[12] that it has been repeatedly repudiated by the courts. The law still remains unsettled on this question but the great weight of authority [13] is that he may be compelled to answer, if the answer can have no effect upon the case, except so far as to impair the credibility of the witness, he may fall back upon his privilege. But even in the latter case, if the answer of the witness will not directly show his infamy, but only tend to disgrace him, he is bound to answer. [14] In questions involving a criminal offense, the rule, as we have seen, is different, the witness being permitted to judge for the most part for himself, and to refuse to answer wherever it would tend to subject him to a criminal punishment.[15]

The privilege is a personal one, which the witness may waive.[16] He is said to waive it when he testifies without objection.[17] By testifying as to part, he waives the protection and can be compelled to testify as to the whole.[18] In order to be available, it must be claimed by the witness,[19] and if he does not, no one else can claim it for him, nor can he use it for the protection of another.[20] The proper time to raise the objection is upon the asking of the question which the witness fears he may incriminate himself by answering, at whatever stage of the proceeding such question is asked.[21] He cannot avail himself of the privilege by stating he throws himself

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[10] Comm. v. Halloway, 44 Pa. 210 (1863); Rosson v. State, 23 Tex. App. 287 (1887); U. S. v. Wilson, 7 Pet. 150 (U. S. 1833).

[11] Field, J., dissenting, Brown v. Walker, *supra,* note 7.

[12] Wigmore Ev. (1905), Vol. IV, p. 3108.

[13] 1 Greenl. Ev. (15th Ed.), §§454, 455; People v. Mather, 4 Wend. 229 (N. Y. 1830); Weldon v. Burch, 12 Ill. 374 (1851); *Ex parte* Rowe, 7 Cal. 184 (1857).

[14] 1 Greenl. Ev. (15th Ed.), §456.

[15] French v. Venneman, 14 Ind. 282 (1860); Simons v. Holster, 13 Minn. 249 (1868).

[16] East India Co. v. Atkins, 1 Stra. 168 (Eng. 1719); Fries v. Brugles, 12 N. J. L. 79 (1830); Comm. v. Nicholls, 114 Mass. 285 (1873).

[17] People v. Willard, 150 Cal. 543 (1907).

[18] People v. Freshour, 55 Cal. 375 (1880); Comm. v. Pratt, 126 Mass. 462 (1879).

[19] State v. Ekanger, 8 N. D. 559 (1899).

[20] *In re* Moser, 138 Mich. 302 (1904).

[21] Amherst v. Hollis, 9 N. H. 107 (1837); Pitcher v. People, 16 Mich. 142 (1867); Eckstein's Petition, 148 Pa. 509 (1892).

on his privilege, but he must make oath that in his opinion the effect of his answer would tend to incriminate him.[22] The witness, himself, is not the sole judge of whether an answer to a question will tend to incriminate him so as to entitle him to refuse to answer;[23] but it is for the court before which the question is raised to decide whether a witness must answer.[24] And, in order to entitle the witness to the privilege of silence, the court must see from the circumstances of the case and the nature of the evidence called for that there is reasonable ground to apprehend danger to the witness from his being compelled to answer.[25]

S. L. M.

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[22] Penna. Bldg., *etc.*, Assoc. v. Mayer, 2 Mont. Co. Rep. 41 (Pa. 1886); People v. Seaman, 8 Misc. Rep. 152 (N. Y. 1894).

[23] State v. Duffy, 15 Ia. 425 (1863).

[24] Comm. v. Bell, 145 Pa. 374 (1891); U. S. v. Burr, Fed. Cas. No. 14, 692e (1807).

[25] Manning v. Mercantile Securities Co., 242 Ill. 584 (1909); State v. Murray, 82 Ohio, 305 (1910).